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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 383

GILSON BROTHERS, A CORPORATION, PETITIONER

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin (R. 138-142) is reported at 255 Wis. 316, 38 N. W. (2d) 492. The judgment of the Circuit Court for Ozaukee County, Wisconsin, appears at pp. 129-133 of the printed record. The Findings of Fact, Conclusions of Law and Order of the Wisconsin Employment Relations Board appear at pp. 107-114 of the printed record.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 of Title 28, U. S. C.

QUESTION PRESENTED

The question presented is whether, absent cession of its jurisdiction by the National Labor Relations Board to a state board, the state board may constitutionally exercise jurisdiction to decide cases involving unfair labor practices within the purview of the National Act, when such practices arise out of employment relations in an industry subject to the National Act and over which the National Board has consistently exercised jurisdiction.

STATUTES INVOLVED

The pertinent provisions of the Wisconsin Employment Peace Act are set forth in the Appendix to the Petition for a Writ of Certiorari, pp. 21-23. The pertinent provisions of the National Labor Relations Act, as amended, are set forth in the Appendix, *infra,* pp. 11-14.

STATEMENT

Gilson Brothers, hereinafter called the Company, is a Wisconsin corporation engaged in the manufacture and sale of various types of road machinery at Fredonia, Wisconsin (R. 108, 139). During 1948, the Company produced finished goods valued in excess of five hundred thousand dollars, ninety per cent of which was shipped to points outside the State of Wisconsin (R. 120). During the same period the Company purchased raw materials, equipment, and other supplies valued in

excess of three hundred and fifty thousand dollars, forty per cent of which was shipped to its Fredonia plant from outside the State of Wisconsin (*ibid.*).

The National Labor Relations Board has uniformly held that companies of comparable size and mode of operation engaged in the production and sale of road machinery are subject to the National Act. See, *e.g., Matter of Littleford Brothers,* 49 N. L. R. B. 949; *Matter of The Jaeger Machine Co.,* 74 N. L. R. B. 476; *Matter of Clearfield Machine Co.,* 78 N. L. R. B. 59, 63.

Pursuant to complaints filed by United Automobile Workers of America, A. F. of L., Region No. 9, hereinafter called the Union, alleging that the Company, in violation of Sections 111.06(1)(a), 111.06(1)(c) and 111.04 of the Wisconsin Employment Peace Act, had discriminatorily discharged three employees for the purpose of discouraging membership in the Union (R. 101-102), the Wisconsin Board conducted hearings and thereafter, on September 28, 1948, issued its Findings of Fact, Conclusions of Law and Order (R. 107-112). The Board found that the employees were discharged "solely for the reason that [they] had engaged in attempting to organize the employees of the" Company (R. 109), and ordered the Company to reinstate them with back pay (R. 110-112). The Board did not investigate the interstate character of the Company's business, and made no findings with respect thereto.

Thereafter, the Company filed with the State Board a petition for leave to adduce additional testimony (R. 114-115). At the hearing on this petition the Company offered to adduce evidence to prove, *inter alia*, that it "is engaged in interstate commerce," and that the State Board was therefore without jurisdiction (R. 115-116). The petition was denied (R. 116-117).

The State Board filed a petition for enforcement of its order in the Circuit Court of Ozaukee County (R. 117). The Company filed a "Motion to Dismiss, And in the Alternative, Motion for leave to Adduce Additional Testimony," alleging *inter alia*, that "neither the Wisconsin Employment Relations Board nor this Court has jurisdiction over the subject matter involved in these proceedings" by virtue of the effect of Sections 7, 8 (a) (1), 8 (a) (3) and 10 (a) of the National Labor Relations Act, as amended (R. 117-119). In support of the Motion the Company filed with the court an affidavit of John Gilson, president of the Company, containing the facts concerning the interstate operations of the Company (R. 120). The court assumed that it was empowered, under Section 111.07(7) of the Wisconsin Act, to grant the motion to adduce additional evidence concerning the Company's interstate transactions, but denied the motion on the ground that the proffered evidence was not material to the question of jurisdiction. The court held that under the Wisconsin decisions the State Board is not deprived of jurisdiction

over cases which the National Board is empowered to handle unless and until application is made to the National Board to handle the matter, and therefore the mere showing that the Company is subject to the National Act does not deprive the State Board of jurisdiction (R. 124-125). The court, on March 11, 1949, entered its judgment enforcing the order of the State Board (R. 129-133).

The Supreme Court of Wisconsin affirmed (R. 142). Like the Circuit Court, it assumed that the facts concerning the interstate operations of the Company were properly before the court (R. 140), but held nevertheless that the State Board had jurisdiction (R. 140-141). The court said (*ibid.*):

> At the hearing in the circuit court the company contended that the order of the board should be dismissed for the reason that the National Labor Relations Board has exclusive power to regulate the activities sought to be regulated by the state board in this proceeding as the company is engaged in interstate commerce, and for the further reason that the policy and procedure of the National Labor Relations Act differ from the policy and procedure of the Wisconsin Employment Peace Act. The same contention is made before this court.
>
> The question of jurisdiction was not raised at the hearing before the Wisconsin Employment Relations Board except that upon its petition to the board for leave to adduce additional testimony the company indicated that

as part of the additional testimony it wished to show that the employer was engaged in interstate commerce. It also contended before the circuit court, and contends here, that if the jurisdictional facts were not properly before the board and the circuit court, the company's request for leave to adduce additional evidence should have been granted.

The question of the jurisdiction of the board is not new. It has been presented many times in this court in cases arising under the provisions of the Wisconsin Employment Peace Act. In this case, the record shows that the company is a Wisconsin corporation, conducting its manufacturing operations in Wisconsin, with Wisconsin employees. There is nothing in the record to indicate that the National Labor Relations Board had ever accepted or attempted to exercise jurisdiction in a matter affecting the company or its employees, or that any petition has ever been filed requesting it to so act. Under the law as established by prior decisions of this court the Wisconsin Employment Relations Board had jurisdiction. *Wisconsin Labor R. Board* v. *Fred Rueping L. Co.,* 228 Wis. 473, 279 N. W. 673; *Allen-Bradley Local 1111* v. *Wisconsin E. R. Board,* 237 Wis. 164, 295 N. W. 791; *International B. of E. W.* v. *Wisconsin E. R. Board,* 245 Wis. 532, 15 N. W. (2d) 823; *International Union* v. *Wisconsin E. R. Board,* 250 Wis. 550, 27 N. W. (2d) 875, 28 N. W. (2d) 254; *Wisconsin E. R. Board* v. *Algoma P. & V. Co.,* 252 Wis. 549, 32 N. W. (2d) 417.

ARGUMENT

The decision of the Supreme Court of Wisconsin, issued on July 12, 1949, is clearly in conflict with the decisions of this Court in *Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U. S. 767, and *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18. The decision below reveals that the Supreme Court of Wisconsin continues to adhere to, and in this case has again applied, the same "case by case" test of federal supremacy which this Court has twice repudiated.

At the time the Supreme Court of Wisconsin decided this case the National Labor Relations Act, as amended in 1947, was already in effect.[1] Section 10 (a) of the Act, as amended, reads as follows:

> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may

[1]The amendments became effective on August 22, 1947, Section 104 of the Labor Management Relations Act, 1947.

> involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

This Court pointed out in *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 313, that the purpose of the proviso to Section 10 (a), as amended, was "to meet situations made possible by *Bethlehem Steel Corp.* v. *New York S. L. R. B.,* 330 U. S. 767, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 40; S. Rep. No. 105, Minority Views, Part 2, 80th Cong., 1st Sess. 38." By amending Section 10 (a) in this manner Congress affirmed the rule of the *Bethlehem* case that state agencies are not free to assert jurisdiction over cases subject to the jurisdiction of the National Board, whether or not a charge or petition had been filed with the National Board.[2] *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board, supra,* at 336 U. S. 18, 27. In authorizing the Board under certain circumstances to cede its jurisdiction to state agencies Congress made manifest its in-

[2] As pointed out in the *Bethlehem* case (330 U. S. at pp. 775-776), it is immaterial to this question that the provisions of the state and federal statutes are similar and that the state and federal administrative agencies might make similar determinations in the circumstances.

tention that, absent cession, the states were not to exercise jurisdiction as to matters covered by the National Act involving employers and employees who are subject to the National Act.

With respect to the specific matter involved in the case before the Court, discharge of employees for union activities, the National Act and the Wisconsin Act have "parallel provisions" (*Algoma Plywood Co.* v. *Wisconsin Employment Relations Board, supra,* at 336 U. S. 313). Compare Sections 111.04, 111.06(1)(a) and 111.06(1)(c) of the Wisconsin Act with Sections 7, 8 (a) (1) and 8 (a) (3) of the National Act. This is precisely the situation, as the Court recognized in the *Algoma* case, in which cession by the National Board must take place before the state is empowered to act. See also *LaCrosse Tel. Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18, 27.

Nor can there be any question but that the Company here involved is subject to the provisions of the National Act. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601. The National Board has consistently exercised jurisdiction over companies in the same industry, transacting interstate business of similar magnitude (*supra,* p. 3). Indeed, the Supreme Court of Wisconsin itself assumed that the operations of the Company brought it within the purview of the National Act (*supra,* pp. 5-6).

The National Board has not ceded to the Wiscon-

sin Board any jurisdiction over this type of case or over the employer here involved. Absent cession, we think it clear that the exercise of jurisdiction by the Wisconsin Board and courts in this case is in conflict with the National Act.

CONCLUSION

The question herein presented is of substantial importance in the administration of the Act. For the reasons set forth above, we believe that the decision of the court below is in conflict with controlling decisions of this Court and should be reversed. The Solicitor General, on behalf of the Board, therefore respectfully urges that the petition for a writ of certiorari be granted. If the writ is granted and oral argument scheduled, the Board respectfully prays leave to participate therein.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

NOVEMBER 1949.

APPENDIX

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—

* * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the

appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry

(other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

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